

CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4742

Heard in Montreal, June 10, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION**

DISPUTE:

Dismissal of Mr. L. Miller.

JOINT STATEMENT OF ISSUE:

On August 8, 2019, the Grievor, Mr. Levi Miller, was formally advised that he was dismissed from Company service effective August 8, 2019, for the following reason(s): "*Positive post incident test results that were supplied to the Company on July 5, 2019 following an incident where a power pole was contacted by a material ten ton you were operating on their party property*".

The Union objected to the dismissal and a grievance was filed.

The Union contends that; 1) the Notice of Investigation to the grievor on July 29, 2019 states that it was "in connection with the post incident accident non-negative substance test results" supplied on July 5, 2019. However, on July 5, the drug screen result (provided by Dynacare) was negative and the grievor was returned to work for at least two more days before being removed from service. In view of this, the Notice of Investigation was improper and constituted a violation of section 15.1 of the Collective Agreement.

2) Given the POCT Test result, the grievor was (at the very least) below the threshold limit and could not be considered impaired at work. Consequently, the assessment of discipline constituted a violation of the Company's Drug Testing Policy.

3) Given the circumstances, the Company's decision to test the grievor was a violation of its Drug Testing Policy.

4) In general, the grievor's dismissal was improper, excessive and unwarranted.

The Union requests that; the grievor be reinstated forthwith without loss of seniority and with full compensation for all losses incurred as a result of this matter.

Company Position:

1) The Notice of Investigation provided to the Grievor on July 29, 2019 made reference to the samples he supplied on July 5, 2019 and had attached as evidence an e-mail from the alcohol drug plan administrator. The e-mail confirmed that the urine and oral fluid samples the

Grievor provided on July 5, 2019 were positive (non-negative), therefore the Notice of Investigation was in compliance with section 15.1 of the Collective Agreement.

2) The Grievor's samples he supplied on July 29, 2019 were tested and analyzed as per HR 203 – Alcohol and Drug Policy and Procedures Canada.

3) The Grievor tested positive for marijuana in his urine and oral fluid samples which constitutes a clear violation of Rule G.

4) As per the positive tests the Grievor was unfit for duty and not free from acute, chronic, hangover and after-effects as indicated in HR 203.

5) The Grievor made contact with a power pole while operating equipment. This is a serious incident and therefore subject to post-incident drug and alcohol testing.

6) The Grievor's dismissal was a violation of Rule G which warrants discipline up to and including dismissal.

The Company maintains that the discipline assessed was appropriate in all the circumstances.

FOR THE UNION:
(SGD.) G. Doherty
President

FOR THE COMPANY:
(SGD.) F. Billings
Senior Director, Labour Relations

There appeared on behalf of the Company:

F. Billings – Manager Labour Relations, Prince George
S. Oliver – Senior Manager Labour Relations, Toronto

And on behalf of the Union:

D. Brown – Counsel, Ottawa
G. Doherty – President, Ottawa
H. Helfenbein – Vice President, Medicine Hat

AWARD OF THE ARBITRATOR

1. The Grievor joined the Company on July 28, 2014 and at the time of the incident (July 5, 2019), his position was that of an Assistant Extra Gang Foreman.

2. On that date, while driving a 10-ton truck on third party property, the Grievor, while backing up, made contact with a power pole which damaged the pole.

3. As a consequence, the Grievor was post-incident tested later that day. That test, known as the Point of Collection Test (POCT; Union Tab 1) reflects that the drug screen was “*negative*” and that the test would be “*sent for further testing...*”.

4. As a result of the POCT, the Grievor was returned to work and worked for a further two days before the Company received further confirmation testing from the laboratory that confirmed the Grievor's drug concentration limits exceeded those under *HR203.1, CP Work Place Testing Program* and that the concentrations of marijuana present in the samples was: 32ng/ml (urine) and 15ng/ml (oral fluid; Company Tab 4).

5. The Union's principal defence is that since the July 5th POCT test reflected, as stated on the Form, that it was negative and that the Grievor was returned to work for at least two more days before being removed for service, the notice of investigation requiring the Grievor to attend a post-incident accident non-negative substance test result, was improper and constituted of violation of Article 15.1 of the Collective Agreement.

6. In its Brief (paragraph 16), the Union phrases its argument as follows:

... the Company, in violation of its own Policy and the grievor's privacy rights, for some unknown and unexplained reason, sent the grievor's test result for further analysis and that, for some further unknown reason, it came back positive. However, this only occurred on July 9, 2019 some 4 days after the incident of July 5th (see Company email attached at Tab 9). In other words, what happened is that despite everything that occurred on and after July 5th, on July 9th, some four days later, the Company retroactively decided that the grievor had been impaired on July 5th.

7. In response, the Company responded that it followed the testing procedures as outlined in HR203.1 and that the Union's argument, as set out above, either confuses or misrepresents the realities.

8. A review of the Company Policy (para. 6.15) makes it clear (as does the Dynacare document (Union Tab 1) provided to the Grievor at the POCT that, once gathered: "... **All POCT** test samples are sent to the laboratory for further confirmatory analysis...".

9. By his own admission, the Grievor smoked marijuana the previous evening prior to the incident giving rise to this grievance.

10. The drug testing samples obtained from the Grievor at the POCT pursuant to HR203.1 revealed the following (Company brief):

34. The drug concentration limits under HR 203.1 CP Workplace Testing Program (Tab 5) for a urine sample is 15 ng/ml. The Grievor's sample contained twice that amount having 32 ng/ml of marijuana present.

35. The drug concentration limits under HR 203.1 CP Workplace Testing Program (Tab 5) for an oral fluid sample is 10 ng/ml. The Grievor's sample contained one and a half times this amount having 15 ng/ml present.

11. Unfortunately for the Grievor, he tested positive after taking an oral fluid (swab) test. The oral fluid (swab) test, unlike the results of urine testing standing alone, has been accepted by this Office as a reliable determinant of impairment. As Arbitrator Picher noted in *CNR v. USWA, Local 2004*, 2008 CarswellNat 6269:

There is existing technology which would allow the employer to test for actual impairment, should it wish to do so. Taking that approach would appear to avoid any controversy about impairment. (see, Imperial Oil Ltd. v. C.E.P., Local 900 [2008 CarswellOnt 669 (Ont. Div. Ct.)], (2008 CanLII 6874).

12. In the circumstances here, the Grievor's admission; his oral swab test; and the report of Dr. Snider-Adler (*Company Tab 7*), leave me to conclude that the Company has proven, on a balance, that the Grievor's abilities were impaired at work.

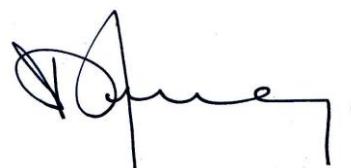
13. As indicated by Arbitrator Moreau in **CROA 4733**:

... There is simply too much risk to the Company and the public when an employee in a safety-sensitive position like the grievor reports to work in an impaired condition, in violation of the Company's drug and alcohol policy and CROR Rule G, and then goes on to carry out his assigned duties...

14. There are largely no mitigating factors which would lead me to conclude that the Company's decision to dismiss should be interfered with.

15. Accordingly, the grievance is dismissed.

June 30, 2020

A handwritten signature in black ink, appearing to read "Richard I. Hornung", written over a horizontal line.

**RICHARD I. HORNUNG, Q.C.
ARBITRATOR**